1757

NEWBURYPORT WATER COMPANY, APPELLANT,

v.

CITY OF NEWBURYPORT, APPELLEE.

No. 182.

APPELLEE'S BRIEF.

STATEMENT.

The appellant is attempting, by a bill in equity in the Circuit Court of the United States, to avoid its own sale of its water works to the city, under a statute which gave it the option of such sale on specified terms as an alternative to municipal competition, and to set aside the proceedings of the Supreme Court of the State, set on foot by itself under the same statute, for ascertainment of the purchase price, in which no Federal or other constitutional question was raised; on the ground that these proceedings amount to a *taking* of its property without just compensation, in violation of the due process requirement of the 14th Amendment, as the statute did not provide for payment for its franchise rights; and that the statute impairs the obligation of its hydrant contract with the city.

The substance of the case, as stated in the final opinion of the Circuit Court (Record, pp. 113, 114, 120-122), is as follows: —

While the appellant (hereinafter called the company) was engaged in supplying the city of Newburyport, the appellee (hereinafter called the city) and its inhabitants with water, under a non-exclusive franchise and a hydrant contract with the city, the legislature granted to the city, by St. 1893, c. 471, authority to supply itself and its inhabitants with water, with authority also to purchase the company's property if offered; which the city voted not to do. Thereupon the company applied for relief to the legislature, which, by St. 1894, c. 474, forbade the city to supply itself under St. 1893 unless it should first purchase the company's property, if offered, at "the fair value of said property for the purposes of its use by said

city . . . without enhancement on account of future earning capacity or good will or on account of the franchise of said company;" to be ascertained by commissioners appointed by the Supreme Judicial Court, their award when accepted by the court to be final. (Record, pp. 33, 34.)

The company immediately voted to offer and offered its property to the city under the statute; the city voted to purchase it; the company conveyed it to the city by deed; commissioners were appointed by the court, on the company's petition, and after extended hearings made an award of $275,000, which was unsatisfactory to the company. The company presented and argued its case before a single justice, and thereafter before the full law court, making no claim of Federal right and raising no Federal or other constitutional question (Record, p. 13); and the award was accepted by the court. (168 Mass. 541; Record, pp. 53-56.)

Thereupon the company filed in the Circuit Court of the United States the bill from dismissal of which this appeal is taken, claiming that these proceedings amounted to a taking of its property without just compensation, and a denial of the equal protection of the laws, in violation of the due process and equality requirements of the 14th Amendment, on the ground that the sale and deed of its property were made under compulsion of the statute, amounting to duress, and without payment for its franchise rights, especially its right to lay pipes in the streets; and that they impaired the obligation of "contracts belonging to said company and to its stockholders" (Record, p. 15) in violation of the contract clause, of the Federal constitution; praying that all the proceedings under St. 1894 be adjudged void, the deed cancelled and the property restored, or that just compensation therefor be ascertained and the city ordered to pay the same; and for injunction against payment of the award or interfering with the works, and for a receiver.

The Circuit Court overruled a motion to dismiss for want of jurisdiction, and a demurrer on this and other grounds (Record, pp. 57, 95, 96); heard the question of a taking of property, which alone the company then desired to be heard (Record, p. 92), on bill, answer and stipulation of facts; and held that the grant to the city of a competing franchise was within the power of the legislature,

as the company's franchise was not exclusive; that this did not amount in law to duress or compulsion; that the company's conveyance of its property to the city was in law voluntary; and that it had not been deprived of its property without due process of law, in violation of the 14th Amendment. (Record, pp. 113, 127.)

Then the company, for the purpose of laying a foundation for a claim of impairment of contract, applied for leave to introduce the testimony of the valuation commissioners that its hydrant contract with the city was not actually included or valued in their award. (Record, pp. 94, 107.) The court, without passing upon the admissibility of the evidence at that stage, held it to be immaterial and ineffectual, if admitted; on the grounds that the statute could not be made to impair the obligation of contracts by any action of the commissioners, and that all the company's proceedings had already been adjudged voluntary; and entered a final decree dismissing the bill, from which this appeal is taken. (Record, pp. 107, 128, 129.)

PRELIMINARY GROUNDS OF DISMISSAL OR AFFIRMATION, NOT INVOLVING THE MERITS.

The bill might properly have been dismissed below, and the decree appealed from may now properly be affirmed, or reversed for the purpose of dismissing the bill, upon grounds not taken in the opinion of the Circuit Court or assigned as error, preliminary to and not involving consideration of the merits or the constitutional questions.

1. The bill does not present a case "arising under the Constitution or laws of the United States," in the sense of the act of Aug. 13, 1888, of which the Circuit Court could properly entertain jurisdiction.

2. By its proceedings under St. 1894, the company is precluded and estopped from denying its constitutionality, and from asserting the claim of violation of Federal right stated in the bill; which therefore presents no Federal question of which the Circuit Court could properly entertain jurisdiction.

3. By electing to accept St. 1894, and by proceeding thereunder to acceptance of the award, the company waived its right to resort to another and different remedy, and is estopped from so doing.

4. The bill is in the nature of a bill of review, or an appeal from and attempt to set aside the proceedings and judgment of the State court, which is not within the powers of the Circuit Court.

Jurisdiction of the Circuit Court.

I.

This is not a Suit "arising under the Constitution of the United States."

The bill does not present a case "arising under the Constitution or laws of the United States," within the meaning of the act of Aug. 13, 1888 (originally St. March 3, 1875) extending the original jurisdiction of the Circuit Courts. (25 St. L. 433.) The bill should have been dismissed by the Circuit Court for want of jurisdiction, on the city's motion (Record, pp. 95, 96); and the decree may now be reversed for the purpose of ordering such dismissal, according to the rule of the cases below cited.

It is not enough to give the Circuit Court jurisdiction that there may be a Federal question in the case. It is settled that the "suits arising under the Constitution or laws of the United States," in the sense of the act of 1888, do not include all the classes of which this court has appellate jurisdiction from the State courts under Rev. Sts., § 709.

Cooke *v.* Avery, 147 U. S. 375, 385, and cases cited.

The original jurisdiction of the Circuit Court is much narrower, and seems from the decisions to be confined to cases in which the construction of the Federal Constitution or laws is directly involved. "If from the questions it appears that some title, right, privilege or immunity on which the recovery depends will be defeated by one construction of the Constitution or a law of the United States, or sustained by the opposite construction, the case will be one arising under the Constitution or laws of the United States, within the meaning of that term as used in the act of 1875; otherwise not."

Starin *v.* New York, 115 U. S. 248, 257, and cases cited.

If the cases mean, as they appear to, that jurisdiction exists only when a new construction is sought, and that a mere question whether the Federal Constitution has any relation or application to

the case is not enough, the present case is not within the rule. The plainest expression on this subject seems to be that of Mr. Justice Brewer while in the Circuit Court: "When a proposition has once been decided by the Supreme Court, it can no longer be said that in it there still remains a Federal question." (Kansas *v.* Bradley, 26 Fed. 289, 290.) This was a removal case, but the same principle is applicable here, especially as this bill is nothing but an attempt to remove into the Circuit Court for re-trial a case already tried and determined in the Supreme Court of the State.

No question of the construction of the Constitution is involved in the case presented by the bill. The company, evidently accepting the established construction of the 14th Amendment, that a taking of property by or under authority of a State without due provision for compensation is a failure of due process, and the construction of the contract clause established ever since the Dartmouth College case, says that the Massachusetts statute of 1894 and the proceedings under it amounted to a taking of its property without just compensation, and therefore to violation of the due process requirement; and that it had a contract which was taken and not paid for and was thereby impaired.

The only question actually presented by the bill is whether the proceedings amounted to a taking of the company's property. The contract question depends on this, as confessedly there was no impairment of contract unless there was a taking of property. Whether there was a taking of property is not primarily a Federal question; whether the company had an impairable contract is not primarily a Federal question; and neither question calls for any construction of the Federal Constitution, with which it has nothing to do.

The question presented, upon which the right to maintain the bill depends, is of the effect of proceedings by or under authority of the State, upon rights derived from the State and not from the United States. The only color of a Federal question is whether the Federal Constitution, however construed, has any application to the case. It is claimed that it has; but it is not claimed that its applicability or effect depends upon any question of its construction, nor is any particular construction sought which will make it applicable while a different construction might not.

This is wholly foreign to the test established by the cases. It is not a claim which "will be defeated by one construction of the Constitution or a law of the United States, or sustained by the opposite construction." (Starin *v.* New York, *ubi supra.*) The case is plainly with the rule that the repugnancy of a State statute or proceeding to the Federal Constitution "is to be passed upon by the State courts in the first instance, the presumption being in all cases that they will do what the Constitution and laws of the United States require; and, if there be ground for complaint of their decision, the remedy is by writ of error under section 709 of the Revised Statutes."

New Orleans *v.* Benjamin, 153 U. S. 411, 424.

See also

McGirr *v.* Des Moines, 174 U. S. 168, 181.
Evansville Water Supply Co. *v.* Mobile, 175 U. S. 109.
Defiance Water Co. *v.* Defiance, 191 U. S. 184, and cases cited.
Owensboro *v.* Owensboro Water Co., 191 U. S. 358.
Interstate *v.* Blackburn, 191 U. S. 405, 413.

II.

Waiver of the Federal Question and Estoppel by taking the Benefit of the Statute.

For another reason, the Circuit Court should have declined jurisdiction of the bill, and the decree may now be reversed for the purpose of dismissing it.

It is an established and familiar rule that one who takes the benefit of a statute is held thereby to have waived any right to thereafter attack it as unconstitutional or otherwise invalid. Upon the facts disclosed in this record, the present case is directly within this rule; the company was estopped to assert that the statute is in violation of the Federal Constitution; and, accordingly, the bill presents no Federal question of which the Circuit Court should have entertained jurisdiction.

Electric Co. *v.* Dow, 166 U. S. 489, is conclusive. A statute providing damages for flowing land gave each party a right to elect jury trial, and prescribed that fifty per cent. should be added to the verdict. The State court held that the company, by claiming a jury and going to trial of a petition against it, was estopped to question the constitutionality, under the 14th Amendment, of this provision.

This court concurred in this view, held that for this reason no Federal question was presented, and dismissed the writ of error, saying: "The plaintiff in error, by availing itself of the power conferred by the statute and joining in a trial for the assessment of damages, is precluded from denying the validity of that provision which prescribes that fifty per cent. shall be added to the amount of the verdict. The act confers a privilege, which the plaintiff in error was at liberty to exercise or not, as it thought fit."

This case shows also that, if the company had asserted this Federal claim in the State court, and had there been held estopped to raise it, as it properly should have been, this court on writ of error would have refused to consider it. It is clear, therefore, that the company, by this bill, is taking advantage of its own laches and default in omitting to raise the Federal question in the State court, to secure a consideration of it by this court to which it would not have been entitled in the regular course of procedure. If not entitled to it there, it cannot be entitled to it here.

The principles of waiver and estoppel belong to general jurisprudence, and are of general application, alike in State and Federal courts. If the company was precluded by its conduct from asserting this alleged violation of Federal right in the State court, it is equally precluded from asserting it in a Federal court.

In City Railway Co. *v.* Citizens Railway Co., 166 U. S. 557, 568, the court held the company disabled from questioning the validity of an ordinance by its previous application for it, notwithstanding it was not subsequently accepted. This is especially in point here, as the company, by its own petition, sought the act of 1894 (Record, pp. 5, 6, 32), which it now attempts to avoid after taking advantage of it.

See also

Clay *v.* Smith, 3 Pet. 411.
Chapman *v.* Forsyth, 2 How. 202.
Daniels *v.* Tearney, 102 U. S. 415, 421.
Gibbs *v.* Baltimore Gas Co., 130 U. S. 396, 408.
Cole *v.* Cunningham, 133 U. S. 107, 115.
Ashley *v.* Ryan, 153 U. S. 436, 441.
Pierce *v.* Somerset Railway, 171 U. S. 641, 648.
Hale *v.* Lewis, 181 U. S. 473, and cases cited.
O'Brien *v.* Wheelock, 184 U. S. 450, 491.

The law of Massachusetts upon the subject is shown in the following cases: —

Haskell *v.* New Bedford, 108 Mass. 208, 213.
Bancroft *v.* Cambridge, 126 Mass. 438, 442.
Eustis *v.* Bolles, 146 Mass. 413.
Braintree Water Co. *v.* Braintree, 146 Mass. 482, 486.
Rockport Water Co. *v.* Rockport, 161 Mass. 279.
Citizen's Gas Lt. Co. *v.* Wakefield, 161 Mass. 432, 439.
Hudson Elec. Light Co. *v.* Hudson, 163 Mass. 346, 348.

III.

Waiver and Estoppel by Election of Remedy.

This ground of objection to the bill, cognate to but not precisely the same as the preceding, may oust the jurisdiction of the Circuit Court, or, if not, it furnishes another reason for dismissing the bill there, upon which the decree should now be affirmed.

When St. 1894 was enacted, the company, as shown above, had a choice of rights and of remedies. It could avail itself of the statute and sell its property to the city on the statutory terms, or, if it believed the statute unconstitutional, as an attempt to deprive it of its property without proper compensation, as now asserted, it could resort to the express remedy provided by section 4 (Record, p. 34), to restrain the city from any attempt to supply itself with water under it; or, if unwilling to risk omitting to make the offer of sale within the thirty days limited by the statute (Record, p. 33), it could, as shown above, make the offer provisionally, to save its rights, and bring a bill against the city forthwith to determine the constitutional questions; or the company could make the offer of sale in such a bill, brought within the thirty days, conditionally upon the statute being held constitutional.

The company made its choice, and, instead of resorting to either of these courses, elected to avail itself of the statute. It cannot now resort to the other remedy, as it is attempting to do by this bill. When a party has a choice of remedies, he cannot exhaust one and then resort to the other because he is disappointed in the result of the first. The case is within the principle, if not the rule, of *res judicata*.

The removal acts, which involve the same principle, "do not

contemplate that a party may experiment on his case in the State court, and, upon an adverse decision, then transfer it to the Federal court. Here, Rosenthal has gone through the State trial and appellate courts, and his rights have been finally declared by the Supreme Court of the State; and, though as yet no formal decree has been entered in the trial court, it is none the less true that he has experimented with the State courts and been beaten, and now seeks a different forum."

Rosenthal *v.* Coates, 148 U. S. 142, 147.

"Any decisive act by a party, with knowledge of his rights and of the facts, determines his election in the case of inconsistent remedies; and one of the most unequivocal methods of showing ratification of an agent's act is the bringing of an action based upon such act."

Robb *v.* Vos, 155 U. S. 13, 43.

The plaintiff "voluntarily commenced an action in the Supreme Court of the State to have the claim established. She invoked the jurisdiction of that court. . . . The questions . . . were within the undoubted cognizance of the Supreme Court. She voluntarily sought its judgment. Can she, after its decision, be heard in any other tribunal to collaterally attack the validity thereof? Does not the principle of *res judicata* apply in all its force? Having litigated a question in one competent tribunal, and been defeated, can she litigate the same question in another tribunal, acting independently, and having no appellate jurisdiction?"

Forsyth *v.* Hammond, 166 U. S. 506, 517.

"The plaintiff in error sought in the State court, and was given opportunity, to litigate the rights claimed by it; and it cannot complain that the guarantees of the Constitution of the United States were denied because the litigation did not result successfully."

Remington Paper Co. *v.* Watson, 173 U. S. 443, 451.

See also

Graham *v.* Boston H. & E. R. R., 118 U. S. 161, 177.
Manning *v.* Amy, 140 U. S. 137, 141.
Wilson *v.* Lambert, 168 U. S., 611, 618.
Mitchell *v.* First Nat. Bank, 180 U. S. 471, 482.
Bienville Water Co. *v.* Mobile, 186 U. S. 212, 216, 217.
Connihan *v.* Thompson, 111 Mass. 270, 272.

Under these conditions, the bill does not present, *bona fide*, a real Federal question. The Federal claim is simulated, for the purpose of getting a new trial. The suit "does not really and substantially involve a dispute or controversy properly within the jurisdiction of the Circuit Court," in the sense of St. of March 3, 1875, § 5, 18 Sts. 470; and the bill might have been dismissed below upon this ground.

Cases *supra*, under par. I, p. 6.

See also

New Orleans Water Works Co. *v.* Louisiana, 185 U. S. 344, 345, and cases cited.

THE BILL IS IN THE NATURE OF A BILL OF REVIEW, OR APPEAL.

The bill is an attempt to take advantage of the enlarged jurisdiction conferred upon the Circuit Courts by the act of 1888 (25 St. L. 433), by way of review, or appeal from the State court, to set aside proceedings of that court within its unquestioned jurisdiction, invoked by the company itself, in which the company submitted to and took the judgment of that court upon every question which it desired to raise, without raising any Federal question, and in which all rights now asserted could have been determined, with a right of review of any Federal question in due course by writ of error to this court.

The bill adds nothing to the case as it was before the State court. No *fact* forming any part of the case stated in the bill has transpired since it filed its petition in the State court, except the award and judgment which followed upon that petition. The bill is simply an attempt to get the Federal court to give a different legal effect to precisely the same facts which were before the State court. In other words, it does not present a new or different case, but is an attempt to get from another court a different result from the same case.

Such an attempt is especially undeserving of encouragement in the present case, for the reason that every claim of Federal right now asserted in this bill could have been fully availed of and secured in the State court, with a right of review by this court, at any stage of the proceedings. By negligence or want of belief in the Federal

rights now asserted, the company passed by the Federal remedy, which was equally open to it in the State court, and is now trying to recover it by this bill, because the result there was unsatisfactory.

The company has contended that St. 1893 never took effect until re-enacted by St. 1894. If this is so, clearly the company was neither harmed nor endangered by St. 1893, nor until the passage of St. 1894. But, if the company apprehended municipal competition after the city had accepted St. 1893 and had voted not to purchase the company's property, and claimed or believed that any constitutional right was or could be violated under that statute, it could have gone into court at any time after the acceptance of St. 1893 by the city, Sept. 7, 1893, by bill in equity to enjoin the city from proceeding under it. In such a suit every constitutional right of the company could have been asserted and secured, with the right of review by writ of error to this court of any Federal claim.

Instead of going to the court for relief at that stage, the company went to the legislature, and procured St. 1894, forbidding the city to supply itself under St. 1893 without first purchasing the company's property.

It is certain that St. 1893 was in effect, subject to the condition of purchase imposed by St. 1894, after the passage of the latter statute. If the company believed that St. 1894, or the two statutes together, violated any of its constitutional rights, it could forthwith have gone into equity, at any time after the passage of St. 1894, to enjoin the city from proceeding under that statute, or under both or either; and in such suit every constitutional question now raised, or which the company desired to raise, could have been raised, and every Federal question reviewed on error to this court.

Instead of this, the company hastened to take advantage of St. 1894, by offering and conveying its property to the city, and petitioning for the appointment of commissioners to value it.

It is equally plain that the company could have raised, under that petition, in the State court, any constitutional question now raised, unless estopped by the sale; and if estopped there, it is equally

estopped here. The only violation of Federal right asserted in the present bill is that the company is deprived of its property without just compensation, in violation of due process of law, because the statute did not provide payment for its franchise rights; and that the statute impaired the obligation of its hydrant contract, because the contract was not actually included and valued in the award. It is too plain for argument that the company could have raised these questions under its petition in the State court; by asking that court to hold the valuation clause of the statute in conflict with the 14th Amendment unless construed to include payment for franchise rights; and in conflict with the contract clause unless construed to include the hydrant contract as a subject of valuation; and, upon an adverse ruling, would have had a complete remedy by writ of error to this court.

But the company, as is openly confessed in the bill, asserted no Federal right and raised no Federal question. (Record, p. 13.) The bill attempts to give a reason for the omission (Record, pp. 13, 14), of which it is sufficient to say that it is neither a legal reason nor an excuse. It was never before heard of that a party can try out his case under a statute, to a finality, without raising any constitutional question, and then claim as of right to have the proceedings avoided on the ground that the statute was "novel," and the view taken of it by the court "unexpected." This can be no more than ground for a new trial or re-hearing, and the company practically confesses it so. It is trying to get a re-hearing of its case in another court.

The case of Moore *v.* Sanford, 151 Mass. 285, was much relied on below as excusing this omission. This is a misunderstanding and misapplication of that case; which decides only the familiar proposition that in a petition for damages for a statutory taking of property the validity of the taking cannot be questioned; in other words, it cannot be denied that the property has been taken. But this was not the company's situation. The present bill does not deny the power of the State to take the company's property for the city of Newburyport, nor does it deny the validity of the proceedings which are alleged to amount to a taking of it, except for the single reason that the compensation provided is inadequate. It

asserts a taking, and stands upon it, and complains only of the compensation. It has already been shown that every constitutional question, State or Federal, relating to the sufficiency of the compensation, could have been raised and availed of in the proceedings in the State court. The rule of Moore *v.* Sanford has no application to the case; unless, indeed, when understood, it is authority against the right to maintain this bill.

See also Boston & Maine Railroad *v.* Graham, 179 Mass. 62, 67.

The case in the State court was at an end before this bill was filed, July 21, 1897. Under the statutory provision that the award when accepted by the court should be final (Record p. 34), the judgment of the State court accepting the award, June 14, 1897, was enough. (Record pp. 53, 56.) The company's petition for rehearing (Record, pp. 13, 14) did not reopen or affect that judgment, and it was dismissed before the hearing on demurrer in the Circuit Court (Record, p. 91.)

While this may not oust the jurisdiction of the Circuit Court (Huntington *v.* Laidley, 176 U. S. 668), it is not within the power of that court to review and reverse or set aside the proceedings of a State court acting within its jurisdiction, by way of appeal, or under the conditions here disclosed. The Federal statutes above referred to, extending the original jurisdiction of the Circuit Courts, do not give them any new or general supervisory power over proceedings in the State courts, especially if the Federal rights asserted might have been effectively asserted there, but were not.

In Barrow *v.* Hunton, a removal case, where there was diversity of citizenship, the court said: "If the proceeding is merely tantamount to the common law practice of moving to set aside a judgment for irregularity, or to a writ of error, or to a bill of review or an appeal . . . the United States court could not properly entertain jurisdiction of the case. Otherwise, the Circuit Courts of the United States would become invested with power to control the proceedings in the State courts, or would have appellate jurisdiction over them, in all cases where the parties are citizens of different States. Such a result would be totally inadmissible."

The same principle applies with at least equal force to a case like

this, essentially a bill of review, for which the alleged Federal claim is the only ground of jurisdiction.

Barrow *v.* Hunton, 99 U. S. 80, 83.
Nougue *v.* Clapp, 101 U. S. 551, 554.
Blythe *v.* Hinckley, 173 U. S. 501, 508.
Defiance Water Co. *v.* Defiance, 191 U. S. 184, 191, and cases cited.

See also Hendrickson *v.* Bradley, 85 Fed. 508, 514 and cases cited. (Ct. Ct. App. 7th ct.) S. C. (petition for certiorari denied), 171 U. S. 686.

ARGUMENT AND AUTHORITIES ON THE MAIN QUESTION OF DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS OF LAW. — SPECIFICATIONS OF ERROR I.–VI.

The first six specifications of error (Record, pp. 131, 132) are only different forms of raising this question, and may be conveniently considered together. Specification III. is unwarranted in form. The Circuit Court did not hold "that the sale of the company's property was compulsory in fact."

The ground of the company's claim of deprivation of property without due process of law is that the Massachusetts statute of 1894, or Sts. 1893 and 1894, taken together, in effect compelled the company, in order to avoid ruinous municipal competition, to sell its property to the city for less than its fair value, as the sale is to be "without enhancement on account of future earning capacity or good will or on account of the franchise of said company" (Record, p. 34); that this amounted in law to *duress*, entitling the company to avoid its deed and have the property restored; or that the statute and the proceedings thereunder amounted to a taking of its property without just compensation, and therefore without due process of law; and, accordingly, that the company is entitled to have the sale decreed void and the property restored, or, if retained by the city, to have compensation for its franchise rights; for which, in the alternative, the bill prays. (Record, pp. 16, 17.)

Whether the conveyance was made under duress is not a Federal question. Duress, if proved, would only entitle the company, at

most, to avoid the conveyance and have the property restored. It would not establish a taking of it, nor present any Federal claim. Yet the claim is that the proceedings amounted to taking the property, as by eminent domain, without just compensation, and therefore without due process of law, in violation of the 14th Amendment.

This claim, based as it is upon a sale and conveyance by the complainant, has the merit of entire novelty. To establish the Federal right the company must show both a taking of its property, without which the constitutional requirement of just compensation does not apply, and a failure of just compensation, since the constitution requires this only in the case of a taking. The company does not and cannot deny the power of the State to take its property for the use of the city of Newburyport. The thing complained of is not want of power to take, but failure to provide just compensation as upon a taking. This is necessarily relied on, as well as the alleged compulsion, to make the transaction, which otherwise would plainly be a sale, amount to a taking without due process of law. The claim is that the property was *taken* without due process, not merely because the company was *compelled* to sell it, but was compelled to sell it for *less than its value*.

In short, the Federal claim, reduced to its elements, is that there was a taking *because* there was a failure of just compensation, and that there was a failure of just compensation *because* there was a taking. The premise of each proposition is the conclusion of the other, and the conclusion of each is nothing but the unestablished premise of the other. It runs in a circle. So perfect a specimen of one of the absurdest fallacies is not often found outside the text-books of logic.

The claim involves the further absurdity that, while the legislature had undoubted power to repeal the company's franchise without compensation, and undoubted power to give the city a competing franchise, yet if in doing either it gives the company a right to sell its property to the only customer who can use it, the act becomes unconstitutional.

To make the claim impressive, the bill alleges that the franchise rights of which the company is deprived were worth "more than the sum of $475,000." (Record, p. 16.) It is plain from the context that this precise valuation of so indefinite a thing is reached by the simple process of capitalizing at four per cent. the company's

earnings of $30,000, which yields $750,000, and calling the value of the franchise right in the streets the difference between this sum, which includes the whole earning power of the property employed in the business, as well as of the franchise, and $275,000, the amount of the award ($750,000 — $275,000 = $475,000). (Record, p. 16.) The formidable appearance of the claim is further impaired by the facts that the company's charter was terminable at any time by purchase by the city (charter, section 11; Record, p. 21); was repealable at any time by the legislature (Mass. Gen. Sts., 1860-1882, c. 68, § 41; Record, pp. 3, 4); was not a monopoly, but was subject to competition (179 Mass. 382); and the business a public service, subject to legislative regulation as to rates and otherwise. The company's capital was limited to $300,000 (charter, section 9; Record, p. 21); the answer denies that the whole property and franchise rights were worth more than the amount of the award (Record, p. 68, and p. 10, par. 7); and the company produces no evidence on the question of value.

The company made no point below of the provision of St. 1894, that the property should be valued "for the purposes of its use by said city" (Record, p. 34); evidently conceding, as it must, that this is and is intended to be for its own benefit; as none but the city was authorized by law to use the property, and it would therefore be practically worthless for sale to any other. While generally in eminent domain a limitation to the value for the purchaser's use would be void, this is not a limitation but an enhancement, assuring the fair value. The property is capable of but one use; that is the use which the city is to make of it; it is worth its full value for that use by the city; and worth more to the city than it can be worth to any other customer.

See Greenwood *v.* Freight Co., 105 U. S. at p. 23.

However this may be, this clause adds nothing to the case. If the statute and the proceedings are otherwise valid, this clause cannot make them invalid.

The Circuit Court disposed of this claim by holding, in effect, that the grant to the city of a competing franchise by Sts. 1893 or 1894, or both, being within the constitutional power of the Legislature, as the company's franchise was not exclusive, could not and did not

in law amount to duress or make the company's sale compulsory or voidable; that the sale was voluntary in law; and therefore that the company had failed to show any taking of its property without just compensation. (Record, p. 127.)

It is clear, both on reason and authority, that this conclusion was right, and was unavoidable. There are several short and conclusive answers to the whole case: —

1. While unlawful compulsion might entitle the company to avoid the sale and have the property restored, this involves no Federal right, and presents no Federal question. And when the property is restored, no question of compensation remains.

2. The only effect of the statute was to authorize the city to compete with the company. It is settled that competition with a non-exclusive franchise does not amount to a taking of property or impairment of contract. On the face of the bill, there is no violation of any Federal right.

3. The Massachusetts court holds in this case that the city acquired its franchise rights directly from the State, and not from the company; from which it follows that the company's franchise rights did not pass to the city by the statute or conveyance. (Newburyport Water Co. *v.* Newburyport, 168 Mass. 541, 553.) This court will accept this construction of the statute. (W. W. Cargill Co. *v.* Minnesota, 180 U. S. 452, 456, and cases cited.) If the franchise rights did not pass by the conveyance, they cannot be taken, nor call for compensation.

4. But if they were repealed by the statute, or even if they passed to the city, the Greenwood case, 105 U. S. 13, and others, are conclusive that there is no constitutional right to compensation for them. And, as repeal or termination of the company's franchise disables it from further performance of the hydrant contract, the claim of impairment of contract falls with the claim of a taking of property.

We understand from counsel that the broad claim of an exclusive right to supply water in Newburyport, implied or resulting from the legislation, as set out in paragraphs 3, 4, and 6 of the bill (Record, pp. 1-3), will not be raised here. And, as to the hydrant contract,

the company did not claim below that the contract was exclusive, and this cannot be claimed. Attention is called to some features of it (Exhibit D, Record, p. 26) : —

1. No legislative authority is shown for the making by the city of an exclusive contract. The provisions of the company's charter, by virtue of which the contract was made, do not contemplate, and are insufficient to authorize, an exclusive contract. (Charter, section 8; Record, p. 20.)

2. The contract is, in terms, non-exclusive. The only promise of the city is that it will "pay therefor to the party of the first part the sum of $6,000 in each and every year during the existence of this contract." There is no promise not to seek another or further supply at any time, if it sees fit. There is no promise, in terms, to continue payment for twenty years. The sole obligation of the city is to continue the stipulated payments "during the existence of this contract;" and this, of course, upon the implied condition of full performance by the other party.

3. The promises fixing the period of the contract are the company's promises, in paragraphs *first* and *second*. (See Knoxville Water Co. *v.* Knoxville, 189 U. S. at p. 436.)

4. The contract is only for a municipal hydrant service, for fire protection. It has no reference to domestic supply of the inhabitants of the city.

Stein *v.* Bienville Water Co., 141 U. S. 67, 81; Hamilton Gas Light Co. *v.* Hamilton, 146 U. S. 258, 268; and Long Island Water Co. *v.* Brooklyn, 166 U. S. 685, 696, cited by the Circuit Court, settle beyond dispute that this contract is non-exclusive, and later cases, equally conclusive, are cited below.

The claim of duress (the subject of Specification of Error IV.) cannot be taken seriously. The element of illegality is wholly wanting; the alleged "threats" ascribed to the legislature and the mayor were either lawful acts in themselves, or no more than the indication of a purpose to do lawful acts; the mayor's statements do not bind the city: and they disappear in the proof. (Record, pp. 9, 90*g*, 93.)

Nor, as already noted, would duress, if proved, establish a taking of the company's property, or present any Federal question. At

most, it would only entitle the company to avoid its deed and have the property restored. There is no Federal element in this claim.

In addition to cases cited by the Circuit Court on duress or "threats," see

French *v.* Shoemaker, 14 Wall. 314, 332.
United States *v.* Huckabee, 16 Wall. 414, 431.
Doyle *v.* Continental Ins. Co., 94 U. S. 535, 541.
Silliman *v.* United States, 101 U. S. 465.
Carver *v.* United States, 111 U. S. 609.
United States *v.* Des Moines Co., 142 U. S. 510, 544.
Lane & Bodley Co. *v.* Locke, 150 U. S. 193, 200.
White *v.* United States, 154 U. S. 661, 663.
Thorne Wire Co. *v.* Washburn & Moen Co., 159 U. S. 423, 444.
Cable *v.* U. S. Life Ins. Co., 191 U. S. 288, 308.
Wilcox *v.* Howland, 23 Pick. 167.
Emmons *v.* Scudder, 115 Mass. 367.
Vegelahn *v.* Guntner, 167 Mass. 92, 107.

The motives, reasons or state of mind of the stockholders in voting the sale (see Bill, par. 12; Record, pp. 13, 91, par. 2) are immaterial. They are bound by the act of the corporation, and their motives are not necessarily to be ascribed to the corporation.

Hawkins *v.* Glenn, 131 U. S. 319, 321.
Glenn *v.* Leggett, 135 U. S. 533, 544.
Louisville Water Co., *v.* Clark, 143 U. S. 1, 13.
Hendrickson *v.* Bradley, 85 Fed. 508, 516, and cases cited.

The whole case centres in the single question whether a grant to a city, by a legislature having a reserved power to alter or repeal all corporate charters (Record, pp. 3, 4), of authority to supply itself with water in competition with a local company operating under a non-exclusive franchise and contract, accompanied with the obligation to buy the company's property, if offered, without payment for its franchise rights, amounts to a *taking* of property held under such franchise; a question settled, in principle, ever since the Charles River Bridge case, and now repeatedly determined

by decisions which directly cover the whole ground of the company's claim.

Of the cases cited by the Circuit Court, Lehigh Water Co. v. Easton, 121 U. S. 388, 390; Stein v. Bienville Water Co., 141 U. S. 67, 81; Hamilton Gas Co. v. Hamilton, 146 U. S. 258, 268; and Long Island Water Co. v. Brooklyn, 166 U. S. 685, 696, are directly in point and are conclusive. The only question is of legislative power to authorize competition with a non-exclusive franchise. It is now settled even that an express stipulation in the contract that the city should not compete would have given the company no exclusive right as against the legislature (Walla Walla case, 172 U. S., at p. 13, as stated in 180 U. S. at p. 618; Browne v. Turner, 176 Mass. 9, 15); and that competition by the city is not excluded where competition by others is not excluded (Joplin case, 191 U. S., at p. 156).

In the Gloucester case, now heard with this case, the Massachusetts court declared the similar franchise of that company non-exclusive, the competing charter to the city no violation of the company's franchise rights, and the sale voluntary. (Gloucester Water Supply Co. v. Gloucester, 179 Mass. 365, 381; Gloucester Record, p. 65.) There can be no doubt that all this would have been held by that court in the Newburyport case, had these questions been material. (See Record, p. 54.)

In addition to cases cited by the Circuit Court on the main question of deprivation of property, see

Citizens St. Ry. v. Detroit Ry., 171 U. S. 48, 53.
Walla Walla v. Walla Walla Water Co., 172 U. S. 1, 14, 15.
San Diego Co. v. National City, 174 U. S. 739, 754.
Freeport Water Co. v. Freeport, 180 U. S. 587.
Rogers Park Water Co. v. Fergus, 180 U. S. 624.
Skaneateles Water Co. v. Skaneateles, 184 U. S. 354.
Bienville Water Supply Co. v. Mobile, 186 U. S. 212.
Knoxville Water Co. v. Knoxville, 189 U. S. 434.
San Diego Land Co. v. Jasper, 189 U. S. 439.
Joplin v. Southwest Mo. Lt. Co., 191 U. S. 150.
Owensboro v. Owensboro Water Co., 191 U. S. 358.

Stanislaus County *v.* San Joaquin Canal Co., 192 U. S. 201.
Kennebec Water Dist. *v.* Waterville, 97 Me. 185, 206.
Newburyport Water Co. *v.* Newburyport, 168 Mass. 541, 553, 554.
Gloucester Water Supply Co. *v.* Gloucester, 179 Mass. 365, 382.
Syracuse Water Co. *v.* Syracuse, 116 N. Y. 167. (In this elaborate case a writ of error to this court was dismissed, apparently for want of prosecution. 154 U. S. 519.)

Some cases on which the company may attempt to rely are plainly distinguishable.

The Monongahela case, 148 U. S. 312, where Congress attempted to take or destroy without compensation a franchise granted by a State, plainly has no application here.

In the Walla Walla case, 172 U. S. 1, the contract, duly authorized, though otherwise non-exclusive, expressly forbade the city to establish new works unless and until the contract should be avoided by judicial proceedings, which had not been done. Except for this provision, it is plain that the contract would have been held not to prevent competition by the city. (See 172 U. S. pp. 14, 15.)

In the Los Angeles case, 177 U. S. 558, the contract, duly authorized by the legislature, expressly bound the city not to reduce rates below a given point, which the city did notwithstanding.

Detroit *v.* Detroit Cit. St. Railway Co., 184 U. S. 368, is sufficiently distinguished from the present case by the court, in the Knoxville case, 189 U. S., at 437.

In the Vicksburg case, 185 U. S. 65, the only question determined by this court was that the Circuit Court had jurisdiction of a bill showing that the company had a contract, in express terms exclusive, for an unexpired period of fifteen years, and that the city had repudiated this contract and was proceeding to build new works.

The company may attempt to distinguish its case from the Skaneateles case, 184 U. S. 354, which is apparently conclusive against it, on the ground that there the contract had expired before the village proceeded to build works, while here it had not; and that there the village stood authorized to build works when the company

was incorporated, while here it did not. But, as the company's charter is non-exclusive, and its hydrant contract equally so (upon which the Long Island case, 166 U. S. 685, 696, is conclusive), it clearly acquired no exclusive rights by putting these two non-exclusive rights together; and, accordingly, the legislature had power to grant the city a competing franchise at any time, notwithstanding the company's charter or contract; and it is immaterial that this was done after the company was incorporated, and pending the contract. The Joplin case, 191 U. S. 150, where the city built its works pending the company's contract, is conclusive against the company on the latter point. In the present case, the city never repudiated the contract, nor manifested any purpose to disturb it, as in the Vicksburg, Freeport and Rogers Park cases.

Additional Grounds of Affirmation on the Merits.

The bill might properly have been dismissed, on the merits, and the decree may properly be affirmed, on other grounds, not taken in the opinion of the Circuit Court.

I.

The Conveyance was Voluntary in Fact.

It is not entirely clear from the opinion below whether the Circuit Court found the company's conveyance to be voluntary in fact. If it was so, the whole case is thereby disposed of. The appeal brings up the facts (151 U. S. 663 and cases). Upon the case disclosed in the record, the company's conveyance of its property was in fact voluntary. It imposes on credulity to assert the contrary.

While the company says that St. 1893 did not take effect until "re-enacted" by St. 1894 (Record, pp. 11, 122), in which view no harm was or could be done by that statute, the company applied to the legislature for relief against it; and this resulted in the enactment of St. 1894, under which all the proceedings were had. (Record, pp. 5, 6.) St. 1894 is plainly, on its face, an act of grace for the relief and benefit of the company; the company forthwith upon its passage hastened to secure the opportunity of sale, voting that it "desires" to sell its property to the city, "agreeably

to the provisions of chapter 474 of the Acts of the Legislature of Massachusetts for the year 1894," specifying its *corporeal* property, with no mention of franchise rights (company's vote, Record, p. 7); deeded the property to the city forthwith upon the city's vote to purchase it, after an interval of six months to consider constitutional and other questions (Record, p. 8); petitioned the Supreme Court a week later for appointment of commissioners to value it; tried its case to the commissioners and the court through a period of two and a half years (Record, pp. 9, 53); raised no Federal or other constitutional question at any stage, and urged no question in court except that its right to lay pipes in the streets should be paid for, and evidence of its earnings admitted on the question of value (Record, pp. 53, 54). When the unsatisfactory award of $275,000 was finally accepted by the court, it was for the first time revealed to the company that the statutes and all these proceedings under them were in violation of the Federal Constitution.

It is impossible not to see that the company rushed to embrace the opportunity of sale held out to it by St. 1894, making the sale not only voluntarily but eagerly; that its first doubt arose only when it had failed to impress the commissioners with its own sense of the value of its property, or to persuade the court to set aside the award; and that the bill is not an assertion, *bona fide*, of violated Federal rights, but a mere attempt to avoid the result of the first trial.

II.

The Reserved Power over Corporate Charters.

The Massachusetts statutes of 1893 and 1894 can be sustained, against the constitutional objections here asserted, under the reserved power of the State over corporate charters.

The reserving statute in force when the company's charter was granted in 1880, in the same form as Pub. Sts. 1882, c. 105, § 3, set out in the bill (Record, pp. 3, 4), is Mass. Gen. Sts. 1860, c. 68, § 41, in force since 1831, as follows: "Every act of incorporation passed after the eleventh day of March in the year eighteen hundred and thirty-one shall be subject to amendment, alteration

and repeal, at the pleasure of the legislature." It is elementary that this becomes part of the terms of every corporate charter thereafter granted.

The effect of St. 1893, if it took effect, was no more than to subject the company to the risk of competition by the city. St. 1894 added nothing to this except to forbid the city to compete unless on condition of purchasing the company's property if offered. The extreme effect of either statute, or both, was, therefore, no more than to subject the company to risk of competition.

Hamilton Gas Light Co. *v.* Hamilton, 146 U. S. 258, 270, and Bienville Water Supply Co. *v.* Mobile, 186 U. S. 212, 222, directly determine that competition may be authorized under the reserved power; in the former case, even if the original charter is exclusive.

If it be said that the company's charter was expressed to be terminable on condition of purchase by the city of its "rights and privileges" as well as its property (charter, section 11; Record, p. 21), the cases are conclusive that this does not amount to contract; in other words, the State did not contract with the company that it should have the exclusive right of water supply in Newburyport until the city should purchase *under the particular terms of its charter*. This provision of the charter, while unexecuted, could be altered like any other; and the statutes of 1893 and 1894 may be regarded as, in effect, an alteration of it in this particular. Having unquestioned power to authorize competition without terms, it had power to alter the terms of purchase prescribed in the charter; as the company could not be compelled to sell, on any terms. The greater includes the less. The same thing was done, and was sustained, in

Long Island Water Co. *v.* Brooklyn, 166 U. S. 685, 697.

See also

Browne *v.* Turner, 176 Mass. 9, 14.

The cases go much farther. It is settled that the legislature, in the exercise of the reserved power, could have directly repealed the company's franchise, without compensation, and taken or authorized the city to take its corporeal property, making compensation for that alone. In other words if this had been, as it is alleged to be, an

actual *taking* of the company's property, without compensation for the franchise rights, the reserved power would sustain it.

Greenwood *v.* Freight Co., 105 U. S. 13, is in point, and is conclusive. Here the legislature, under the reserved power, repealed the charter of a railroad company, and by the same act incorporated a new company and conferred upon it the franchise rights of the former, with a requirement to take its tracks, making compensation therefor; amounting to a taking and transfer of the franchise rights of the first company to the second, with compensation only for the corporeal property. This was sustained under the reserved power, and this case has repeatedly been affirmed.

And the city could not, by contract, exclude or affect the exercise of the reserved power of the State.

The repeal of the charter would have put an end to the company's power to further perform the hydrant contract; as, if not, a corporation could put itself, by contract, beyond reach of the reserved power; which is not the law.

Sioux City Street Ry. Co. *v.* Sioux City, 138 U. S. 98, 107.
Long Island Water Co. *v.* Brooklyn, 166 U. S. 685.
Browne *v.* Turner, 176 Mass. 9, 15.
Kennebec Water Dist. v. Waterville, 96 Me. 234, 252-3.

The reserved power, by its express terms, may be exercised "at the pleasure of the legislature;" but, if reasons were necessary, there can be no doubt that the conduct of the company in unlawfully injecting the polluted Merrimac River water into its supply, as disclosed here (Stipulation, Record, pp. 89, 90; and see also the next par. III of this brief), was enough to warrant the unconditional repeal of the company's charter.

See further,

Tomlinson *v.* Jessup, 15 Wall. 454, 458.
Beer Co. *v.* Massachusetts, 97 U. S. 25, 30.
Bridge Co. *v.* United States, 105 U. S. 470.
Spring Valley Water Works *v.* Schottler, 110 U. S. 347.
Louisville Water Co. *v.* Clark, 143 U. S. 1, 13, 17.
Schurtz *v.* Cook, 148 U. S. 397, 410.
N. Y. & N. E. R. R. *v.* Bristol, 151 U. S. 556, 567.
Covington *v.* Kentucky, 173 U. S. 231, 240.

St. Louis, etc., R. R. *v.* Paul, 173 U. S. 404.
Looker *v.* Maynard, 179 U. S. 46.
Louisville, etc., R. R. *v.* Kentucky, 183 U. S. 503, 516.
Knoxville Water Co. *v.* Knoxville, 189 U. S. 434.

For the law as held in Massachusetts upon this subject, see,
Worcester *v.* Norwich & Worcester R. R., 109 Mass. 103, 112.
Metropolitan R. R. Co. *v.* Highland Railway, 118 Mass. 290, 293.
Worcester, &c, R. R. Co. *v.* R. R. Commissioners, 118 Mass. 561, 568, and cases cited.
Thornton *v.* Marginal Freight Railway, 123 Mass. 32. (Affirmed in Greenwood *v.* Freight Co., *supra.*)

III.

The Police Power.

Upon the facts of the case, the Massachusetts statute of 1893 can be sustained as an exercise of the police power for the protection of the public health and safety. If this statute is sustained, St. 1894, which was solely for the relief and benefit of the company, can furnish no ground of complaint.

The record discloses that in June, 1892, the company, having previously in 1889 laid a pipe from its works to the Merrimac river, which it was not authorized to use as a source of supply, began surreptitiously to pump the water of the river into its pipes, which supplied the city and its inhabitants. This was in violation of its charter (Section 2; Record, p. 19) and of the general law, Mass. Sts. 1888, c. 375, the material part of which is as follows: —

"The state board of health shall have the general oversight and care of all inland waters . . . shall . . . cause examinations of the said waters to be made for the purpose of ascertaining whether the same are adapted for use as sources of domestic water supply, or are in a condition likely to . . . imperil the public health . . . shall from time to time consult . . . with corporations . . . having or intending to introduce systems of water supply . . . as to the

most appropriate source of supply. All such corporations . . . are hereby required to give notice to said board of their intentions in the premises, and to submit for its advice outlines of their proposed plans or schemes in relation to water supply."

It appears that at the point where the river water was taken it was carrying the sewage of Lowell, Lawrence, Haverhill and Amesbury, having an aggregate population of 158,000 inhabitants, discharged into it from 1½ to 24 miles above that point; that the State Board of Health had disapproved the use of the river, without filtration, as a source of domestic water supply, and in November, 1892, cautioned the company against the use of it, and that "very little was pumped thereafter;" that sickness in the city during the winter of 1892–93 was attributed by physicians and the State Board of Health to this improper use of the Merrimac river water; and that these facts were put in evidence or were admitted by the company before the legislative committee which had charge of the city's petition for the statute of 1893, at the hearings held at the session of the legislature of that year at which that act was passed. (Stipulation of Facts, Record, pp. 89, 90.)

While the motives of the legislature may be immaterial, it is familiar that the facts or circumstances constituting the situation out of which legislation arises, "as it was pressed upon the attention of the legislative body," may be considered in construing it.

Holy Trinity Church *v.* United States, 143 U. S. 457, 463.

There can be no doubt that discovery of this misconduct of the company led the city to seek an independent water charter, and the legislature to grant it. However this may be, the existence of these facts, admitted by the stipulation, is enough to sustain the statute of 1893 as an exercise of the police power for the protection of the health and safety of the inhabitants of the city; and there is sufficient authority for the support of the statute upon this ground.

Fertilizing Co. *v.* Hyde Park, 97 U. S. 659, 667.
Mugler *v.* Kansas, 123 U. S. 623, 664.
N. Y. & N. E. R. R. *v.* Bristol, 151 U. S. 556, 567, and cases cited.

Pearsall *v.* Great Northern Railway, 161 U. S. 646, 665, and cases cited.
Wabash R. R. Co. *v.* Defiance, 167 U. S. 88, and cases cited.
Chicago, etc., R. R. *v.* Nebraska, 170 U. S. 57, 72, and cases cited.
Walla Walla *v.* Walla Walla Water Co., 172 U. S. 1, 15.
Leovy *v.* United States, 177 U. S. 621, 636.

IMPAIRMENT OF THE OBLIGATION OF CONTRACTS. SPECIFICATIONS OF ERROR VII–IX.

We understand from counsel that the broad claim of an implied contract, excluding competition, resulting from the legislation, etc., as set out in paragraphs 3, 4 and 6 of the bill (Record, pp. 1-3), which was not raised in the Circuit Court, will not be raised here. Probably it is not open. The facts that the city in 1878 and 1879 was granted a water charter and declined to accept it, and aided in obtaining the company's charter in 1880, are objected to as irrelevant and immaterial (see Stipulation, par. 1; Record, p. 87); the city declined to answer these averments, for impertinence (Record, p. 60); the company excepted to the answer for this insufficiency (Record, pp. 73, 74); and subsequently withdrew its exceptions (Record, p. 91). If the claim is open, the cases are conclusive against it, especially the Skaneateles case, 184 U. S. 354; and the Joplin case, 191 U. S. 150.

The only thing remaining to be considered under this head is the offer of evidence that the hydrant contract was not valued or included in the award, for the purpose of laying a foundation for the claim of impairment of its obligation. There are several reasons why the evidence cannot be received nor this claim maintained.

I.

1. If the company's conveyance of its property is held voluntary in law, the claim of impairment of contract falls, of course, with the claim of a taking of property. It is clear beyond dispute that no contract, property or right of the company was touched or affected in any degree by Sts. 1893 or 1894, or both, unless and

until the company chose to sell its property to the city, except that it was exposed to possible competition; and the law is settled that a competing charter does not impair the obligation of a non-exclusive charter or contract. The company could have stood its ground, kept all its contracts, property and franchises unimpaired, and gone on with its business, subject only to the risk of competition, and the city would have had to make the payments called for by the hydrant contract. (See the Bienville case, 186 U. S. at p. 222.) If the company chose the alternative of sale voluntarily, there is an end of any claim of impairment of contract. This is waiver or abandonment of the contract; not impairment of it.

Lovell *v.* St. Louis Ins. Co., 111 U. S. 264, 274.

2. And if it is not held as matter of law that the contract was waived or abandoned, the question remains whether it was waived or abandoned in fact; upon which see "Additional Grounds," *ante*, par. I, p. 22. If this issue is found against the company, there is an end of this claim.

3. In this connection it is also to be considered whether the contract was not terminated by force of its express provisions, if not technically waived or abandoned. The period of the contract is uncertain. The company agrees to "furnish said city water as hereinafter provided unless sooner terminated by the purchase of its property" by the city, "in accordance with section 11 of chapter 235 of the Acts of 1880" (its charter); further that it "will furnish and maintain a full supply of water for fire purposes during the existence of this contract;" and, further, "It is agreed that *said term of twenty years* shall begin" not later than Jan. 1, 1882. This is the only mention of twenty years, and it is only thus inferentially, if at all, that twenty years is the period of the contract. Apart from the question whether the company's sale was voluntary, it may be claimed that its proceedings, in conveying and parting with possession of its property under the statute and thereby disabling itself from further performance, were enough to terminate the contract; so that it cannot thereafter be said to be in "existence," in the sense of its terms. (Contract, Exhibit D; Record, pp. 26, 27.)

II.

If the sale were not to be held voluntary, or the contract waived, abandoned or terminated, the only contract question remaining open under the bill, if any, is whether "said act of 1894 and said act of 1893, as re-enacted by said act of 1894," impaired the obligation of the hydrant contract. (Record, pp. 14*a*, 15*c*.)

On the face of the statutes, plainly they did not reach or affect the contract at all, except to authorize competition, which does not impair its obligation.

If it be assumed, as contended, that the contract was *taken*, it is settled that the taking of a contract does not impair its obligation, if proper provision is made for compensation.

Long Island case, 166 U. S. 685.

The company tries to lay a foundation for this claim of impairment by offering, after the principal question of a taking of property was heard and decided against it, the testimony of the valuation commissioners that they did not in fact value the hydrant contract with the other property, being of opinion that it could not in law be valued; it being agreed, subject to competency, that they would so testify. (Record, pp. 94, 128, 129.)

The Circuit Court excluded the testimony, as immaterial and ineffectual if admitted, on the grounds (1) that what was done or omitted by the commissioners could not make the statutes unconstitutional; and (2) that all the proceedings had already been adjudged voluntary on the part of the company. (Record, pp. 128, 129.)

The latter ground is clearly conclusive against the admission of the testimony, for the reasons given by the Circuit Court and other reasons above stated in paragraph I.

Equally so is the former. Conceding that a construction of the statute by the Supreme Judicial Court, giving it effect to impair the obligation of the hydrant contract, would have presented a Federal question, reviewable by this court on writ of error (New Orleans Water Works Co. *v.* Louisiana, 185 U. S. at p. 350), no construction or misconstruction of it by these commissioners lays any foundation for this claim of impairment, or gives the Circuit Court any ground of jurisdiction or of relief under this bill. The remedy for that was to be sought in the State court, on the ques-

tion of acceptance of the award. It was not sought, nor was the point alluded to. (Stipulation, Record, p. 94.) This claim is a mere afterthought, and presents no real Federal question cognizable by the Circuit Court.

"If the commissioner's conclusions were erroneous, the courts were open for the correction of the error, and the possibility that they might agree with the commissioner could not be laid hold of as tantamount to an actual controversy as to the effect of the Constitution."

Arbuckle *v.* Blackburn, 191 U. S. 405, 415.

See also the cases cited under head of "Jurisdiction," *ante*, p. 6.

III.

The testimony offered is essentially incompetent, and, being offered subject to competency, could not be received, under the terms of the stipulation. (Record, p. 94.)

The commissioners were quasi-judicial officers. The complete and conclusive evidence of their doings is their written award filed in court under the requirement of the statute. (St. 1894, § 1; Record, p. 34; Award, Record, p. 9.) This award cannot be varied, qualified or explained by parol evidence, especially as it is now accepted by and merged in the judgment of the court accepting it. The only exception to this rule is that a referee or arbitrator may testify whether a particular claim was in issue before him, when that is doubtful upon the record; which is not this case. (See Stipulation, Record, p. 94.) A judge cannot be called as a witness to vary or impeach the record of his judgment. If authority is wanted for so plain a proposition, see

Legg *v.* Legg, 8 Mass. 99.
Ward *v.* Gould, 5 Pick. 291.
Gay *v.* Welles, 7 Pick. 217.
Withington *v.* Warren, 10 Met. 431.
Chappell *v.* Hunt, 8 Gray, 427.
Sparhawk *v.* Twitchell, 1 Allen, 450.
Monk *v.* Beal, 2 Allen, 585.
Packard *v.* Reynolds, 100 Mass. 153.
Alexander *v.* McNear, 28 Fed. 403.
Buccleugh *v.* Metropolitan Board of Works, L. R. 5, H. L. 418, 457, 462.

According to this rule, it must now be conclusively presumed that the commissioners did value the contract, if the company was in law entitled to have it valued. In this view, no foundation remains for the claim of impairment. This is settled by

Long Island Water Co. *v.* Brooklyn, 166 U. S. 685.

IV.

If the proffered testimony is regarded as admitted, it establishes nothing to the purpose. While it appears that the commissioners omitted to value the contract for some reason of law, it does not appear that they construed St. 1894 as excluding it, or that their exclusion of it had any relation to that statute; which, therefore, is not thereby shown to have impaired, or been construed to impair, the obligation of the contract. (Stipulation, Record, p. 94.)

V.

The bill does not allege, and the record does not show, that the company distinctly asked the commissioners to value the contract, or furnished any evidence enabling them to value it: indeed, it shows the contrary. It shows also that "in the proceedings in the State court upon the report of the commissioners the company made no claim that the contract should be or had not been valued, and raised no question concerning it." (Stipulation, Record, p. 94.)

VI.

It is clear that the question of fact whether the contract was or was not valued is not a Federal question.

It is equally clear that the fact that the contract was not valued, if proved, does not establish that the statute impaired its obligation. The omission to value the contract cannot be ascribed to the statute, unless that was its necessary effect.

The statute here in question did not take or authorize the taking of the contract at all. There was, therefore, no occasion to expressly provide compensation for it.

The attempt is to lay a foundation for the claim of impairment, by saying that the statute and the proceedings under it amounted to a taking of the contract, and by showing further that the contract was not in fact valued.

But if the statute and the proceedings under it amounted to a taking of the contract, it does not follow that the statute failed to provide just compensation for it. Just compensation was provided for the contract, if it was part of the property which the company was entitled to sell and to be paid for. The condition of St. 1894, is, in effect, that the city shall buy and pay for all the company's property, except its franchise rights. The exception does not include the contract. If the contract was in law a part of the property for which the company was entitled to be paid, the statute provided payment for it. The company does not, and could not, complain that it was not to be valued by a jury.

Long Island Water Co. *v.* Brooklyn, 166 U. S. 685, 695.
Backus *v.* Fort Street Depot Co., 169 U. S. 557, 569.

There was, then, no failure to provide just compensation for the contract, even if the statute is regarded as a taking of it; and accordingly, no impairment of its obligation by the statute.

VII.

Apart from all minor questions, and whether the contract must or must not be presumed to have been valued if entitled to valuation, and treating the rejected offer of evidence as equivalent to proof, the claim of impairment of contract is groundless and frivolous.

The question, reduced to its lowest terms, stated most favorably for the company, is, whether one whose property, including a contract, has been taken under a State statute and valued by proceedings in a State court, who raised no question there concerning the contract, claimed no impairment of it, made no suggestion that it was not valued, or that it was improperly valued, and even failed to distinctly claim that it should be valued at all (see Stipulation, Record, p. 94), can thereafter maintain in a Circuit Court of the United States a bill in equity to set aside the proceedings, on the ground that the statute impaired the obligation of the contract, by showing that it was not in fact valued.

More shortly, this question is simply whether one whose contract has been taken under a State statute, and, by his own neglect, not valued in the award of compensation in the State court, can thereafter claim to have the proceedings set aside by a Circuit Court of

the United States, on the ground that the statute impaired the obligation of the contract.

It cannot be necessary to discuss such a pretension further. Every principle of the law of laches, waiver and estoppel is directly against it. Upon the authorities cited above, such a claim is not within the jurisdiction of the Circuit Court.

SPECIFICATIONS OF ERROR X–XI.

These specifications are for general error in dismissing the bill, and call for no further answer.

ALBERT E. PILLSBURY,
GEORGE H. O'CONNELL, *City Solicitor,*
for the City of Newburyport, Appellee.

GLOUCESTER WATER SUPPLY COMPANY, APPELLANT,

v.

CITY OF GLOUCESTER, APPELLEE.

No. 183.

STATEMENT.

In this case, as in the Newburyport case, *ante*, the appellant is attempting to avoid its own sale of its water works to the appellee city, under the same circumstances and upon the same grounds. The case is essentially the same as the Newburyport case, except that certain minor questions in that case do not arise here; and except that, as this case was disposed of below on demurrer, the question is whether the facts alleged in the bill, taken as a whole, show any Federal right for enforcement of which the company is now entitled to invoke the original jurisdiction of the Circuit Court.

The appellant company, being engaged in supplying the city of Gloucester and its inhabitants with water under a non-exclusive charter (Mass. St. 1881, c. 167; Exhibit A, Gloucester Record, p. 19) and a non-exclusive hydrant contract with the city (Exhibit E, Record, p. 27), sold its water works to the city under Mass. St. 1895, c. 451 (Exhibit K, Record, p. 48). This statute authorized the city to supply itself and its inhabitants with water, on condition of first purchasing the company's property if offered. The purchase clause of this statute (section 16, Record, p. 53), so far as material, is believed to be the same in legal effect as that in the Newburyport case.

After the sale of its property to the city according to the provisions of the statute, the company petitioned for the appointment of commissioners to value it, and tried its case before them. (Record, p. 11.) The commissioners awarded the company $600,500.

Objections of both parties to the award were heard by a single justice, and were reserved for and heard by the full bench of the Supreme Judicial Court (Record, pp. 16, 17), and the award was accepted for the sum of $576,544, with interest. (Record, p. 87.)

Gloucester Water Supply Co. *v.* Gloucester, 179 Mass. 365.

In these proceedings the company raised no Federal or other constitutional question.

Thereupon the company filed in the Circuit Court of the United States the bill from dismissal of which this appeal is taken, in substantially the same form and upon substantially the same grounds as in the Newburyport case; alleging that St. 1895 impaired the obligation of its contracts, and that the statute and the proceedings under it amounted to a taking of its property without due process of law, as its franchise rights to take additional water sources, to lay pipes in the streets and to charge water rates were not paid for; and deprived it of the equal protection of the laws; in violation of the 14th Amendment; praying a decree that St. 1895, c. 451, be adjudged unconstitutional; that the city has taken and holds the property in violation of the company's rights under the Federal Constitution, and for general relief. (Record, pp. 1–19.)

The city demurred to the bill for want of jurisdiction; want of equity; failure to disclose any impairment of the obligation of contracts, deprivation of property without due process of law, or denial of the equal protection of the laws; laches, in omitting to raise any Federal question in the proceedings in the State court; and estoppel to review or revise the proceedings in the State court. (Record, pp. 87, 88.)

The Circuit court heard the case on the bill and demurrer, after the decision of the Newburyport case; held that it was governed by that case; sustained the demurrer, and dismissed the bill. (Record, pp. 89, 92.)

These questions, appearing in the Newburyport case, do not arise in the Gloucester case: —

1. While in the Newburyport case two statutes are involved, with a question whether the earlier took effect, there is but one statute here in question, St. 1895, c. 451.

2. In this case there is no question arising out of non-valuation of the hydrant contract, as it was valued by the commissioners and included in the award.

3. In this case there is no such evidence as that presented in the Newburyport case to sustain the statute as an exercise of the police power for protection of the public health and safety.

SUBMISSION ON THE NEWBURYPORT BRIEF.

This case is fully covered by the argument and authorities in the Newburyport brief. All the grounds of objection there presented to the jurisdiction of the Circuit Court, to the company's right to resort to this remedy after electing to proceed under the statute, or to invoke the Circuit Court to review and set aside the proceedings in the State court, apply equally to this case, for the same reasons.

Upon the merits, the reasons assigned for affirming the decree in the Newburyport case are equally conclusive in this case. The bill asserts the same claim, of a taking of property without due process of law, and impairment of the obligation of contracts, upon the same grounds, and upon facts almost identically the same and of the same legal effect.

All the decisive elements of that case (except the misconduct of the company in polluting its water supply) are present and are equally decisive in this case. The company had no exclusive charter or contract; it was within legislative power to authorize competition by the city; there was no unlawful compulsion or duress; the company's conveyance of its property was therefore voluntary in law, if not also in fact; and there was no taking of property or impairment of the obligation of contracts.

There are the same reasons in this case for holding the conveyance voluntary in fact, if not in law; from which the same result follows.

The reserved power of the State over corporate charters applies equally to this case, and with the same effect, except that no particu-

lar misconduct of this company appears as a ground of exercise of the power.

The claim of impairment of the obligation of contracts, in this case, lacks even the foundation on which it is put forward in the Newburyport case; as in this case the contract was duly valued by the commissioners and included in the award. (Record, pp. 12, 16.)

PRELIMINARY GROUNDS OF DISMISSAL OR AFFIRMATION.

In this case the appellee city submits that the bill should have been dismissed by the Circuit Court for want of jurisdiction, and that the decree should now be reversed for the purpose of ordering such dismissal, for the reasons and upon the authorities presented in the Newburyport brief, *ante*, under the heads "Jurisdiction of the Circuit Court," p. 4, and "Waiver of the Federal Question and Estoppel by taking the benefit of the Statute," p. 6.

It is further submitted that the bill might properly have been dismissed below, and that the decree should now be affirmed, or reversed for the purpose of dismissal, for the reasons and upon the authorities given in the Newburyport brief, *ante*, under the heads "Waiver and Estoppel by Election of Remedy," p. 8, and "The Bill is in the Nature of a Bill of Review, or Appeal," p. 10.

DEPRIVATION OF PROPERTY. SPECIFICATIONS OF ERROR I.–VI.

Upon the main question of deprivation of property without due process of law, raised by Specifications of Error I.–VI., the city submits this case upon the argument and authorities upon this question, under the same head, in the Newburyport brief, *ante*, p. 14.

It is to be noted that in this case the Massachusetts court declares the company's franchise to be non-exclusive; that the grant of a franchise to the city was no violation of the franchise rights of the company; and that the sale was not obligatory upon the company. (Record, p. 85.)

Gloucester Water Supply Co. *v.* Gloucester, 179 Mass. 365, 381.

It is also to be noted that, while the company attempted to convey its franchise rights to the city, by describing and including them in the specification (Record, p. 76, item 40), the statute cannot be deemed to authorize conveyance of the franchise rights (St. 1895, § 16, Record, p. 53); and the city, before voting the purchase, notified the company that it did not admit the correctness of the description, and that the vote would be upon the purchase of the property described in the statute, and not otherwise. (Record, p. 91.) It is agreed that these facts may be taken with the same effect as though they were set out in the bill. (Record, p. 89.) In the Newburyport case, where the purchase clause was the same in effect so far as material to this point, the Massachusetts court held that the city acquired its franchise rights directly from the State, and not from the company; in which view the company's franchise rights did not pass to the city by the statute or conveyance. It must be the same in this case.

Newburyport Water Co. *v.* Newburyport, 168 Mass. 541, 553.

The same reasons exist in this case as in the Newburyport case for holding the conveyance voluntary in fact, upon the face of the bill; and the city submits this contention upon the argument under that head in the Newburyport brief, *ante*, p. 22.

Also that St. 1895 here in question is sustainable as an exercise of the reserved power over corporate charters, for the reasons and upon the authorities submitted in the Newburyport brief, under the head "The Reserved Power over Corporate Charters," *ante*, p. 23, The reserving statute in force when this company's charter was granted in 1881 is the same as in the Newburyport case (Mass. Gen. St. 1860, c. 68, § 41), *ante*, p. 23.

IMPAIRMENT OF CONTRACTS. SPECIFICATIONS OF ERROR VII., VIII.

We understand from counsel that the broad claim of an implied contract, excluding competition, resulting from the legislation, etc., as set out in the bill (Record, pp. 2-5), will not be asserted or argued. The authorities cited by the Circuit Court, and in the Newburyport brief, *ante*, pp. 20, 28, are conclusive against it.

The only remaining question is of impairment of the obligation of the hydrant contract. (Exhibit E, Record, pp. 27-31.) This was the only contract in existence at the time of the purchase, and had then about a year to run. (Record, pp. 11, 25, 28.)

It cannot be claimed that this is an exclusive contract. The clause of the company's charter under which it was made (charter, section 4; Record, p. 20) does not authorize an exclusive contract, at least as against action of the State; and the contract is non-exclusive in terms. The only promise of the city is to make the stipulated payments. There is no agreement not to seek or obtain another water supply.

As this contract was duly valued by the commissioners and included in the award (Record, pp. 12, 16), there can be, in any view of the case, no claim of impairment of its obligation. The Long Island case, 166 U. S. 685, is conclusive upon this.

For the rest, the city submits the contract question upon the argument and authorities in the Newburyport brief, under head "Impairment of the Obligation of Contracts," *ante*, pp. 28–30, 33, 34.

SPECIFICATIONS OF ERROR IX., X.

We understand from counsel that no claim will be made of denial of the equal protection of the laws.

SPECIFICATIONS OF ERROR XI.–XIV.

These are for general error in sustaining the demurrer and dismissing the bill, and call for no further comment.

ALBERT E. PILLSBURY,
CHARLES A. RUSSELL,
for the City of Gloucester, Appellee.

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